ATTORNEY CLIENT PRIVILEGED MATERIAL

16 June 1989

ITEMS OF MAJOR INTEREST -- 9 - 16 June 1989

On 10 May 1989 in the FOIA case Knight v. U.S. Central Intelligence Agency, the Fifth Circuit Court of Appeals in a published opinion affirmed the district court's award of summary judgment for the Agency in declaring that the CIA need not disclose to the plaintiff certain records he had requested regarding the sinking of the Green-peace ship, the "Rainbow Warrior." As a result of the Court of Appeals opinion, which states that courts should not second-guess determination of the DCI in FOIA matters involving the national security, the plaintiff has petitioned the Court of Appeals to rehear his appeal. Prior to his rotation to the Iran-Contra Task Force, [redacted] of OGC's Litigation Division handled this case. Upon Fred's departure, [redacted] also of OGC's Litigation Division is working with the U.S. Attorney's Office in responding to this most recent development.

Secrecy Agreement Litigation. While awaiting docketing of the AFSA case in the District Court (which is on remand from the Supreme Court), we received an offer to enter into negotiations for possible settlement of all three cases which take issue with the Executive Branch's standard nondisclosure agreements. The institutional and congressional plaintiffs offered to dismiss their remaining claims if the Executive Branch parties would: (1) provide personal notice to former employees to inform them that the term "classifiable" has been deleted from the SF 189 and the F 4193; (2) define employees' obligations under the nondisclosure agreements with respect to information that is not marked "classified"; (3) clarify the language of the prepublication review clause (paragraph 4 of Forms 4193 and 4355); and (4) agree that employees should be obligated not to disclose information only during a thirty day review period following the employees submission of the material to the Agency for prepublication review. (U)

After reviewing the settlement offer and concluding that many of plaintiffs' issues for negotiation were not raised in the original lawsuit, we advised DOJ that the only issue we would be interested in discussing prior to returning to Judge Gasch's courtroom would be the possibility of giving former employees constructive (vice personal) notice of the deletion of the term classifiable. Director of ISOO, Steve Garfinkel

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(another named defendant) was also in agreement with this posture. DOJ agreed to convey our response to the plaintiffs and will simultaneously file a Motion to Remand the other two secrecy agreement cases (NFFE and AFGE)---currently stayed at the Court of Appeals---back to the District Court for consideration with the AFSA case in light of the Supreme Court's action. The strategy to this move is to have the District Court reconsider all three and thereby, send to the Court of Appeals, at a later date, more narrowly focused issues. [redacted] of the Litigation Division is handling these cases. (U)

9 June 1989

ITEMS OF MAJOR INTEREST -- 2 - 9 June 1989

Frigard v. United States, 862 F. 2d 201 (9th Cir. 1988) Cert. denied, ___U.S. ___(1989). As described in previous items, this suit was brought by former investors in convicted swindler Ronald Rewald's investment firm. The plaintiffs alleged that CIA negligently allowed Rewald to defraud them, and thus the United States should be liable for the lost investment under the Federal Tort Claims Act (FTCA). The case was dismissed by the district court and the dismissal was affirmed by the Court of Appeals for the Ninth Circuit. On 5 June 1989, the Supreme Court denied the plaintiff's petition for a writ of certiorari, thus ending the case favorably for CIA. With this final appellate step in the Frigard case, the likelihood of any further cases being successfully brought under the FTCA by disgruntled Rewald investors is small. [redacted] formerly of the Litigation Division, has acted of counsel to the Department of Justice on all of the Rewald-related cases. (U)

Fitzgibbon FOIA Litigation. Decisions recently were issued in two cases challenging the extent of the DCI's authority to protect sources and methods. Plaintiff sought documents relating to the disappearance of a critic of the Trujillo regime in the Dominican Republic, and in earlier rulings Judge Harold Greene ordered the release of various CIA documents, or portions. CIA appealed, but the cases were stayed to await the outcome of a ruling by the Supreme Court in CIA v. Sims. Following Sims the Fitzgibbon cases were remanded for reconsideration in light of the decision recognizing the broad authority provided in the National Security Act to protect sources and methods. (U)

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The recent rulings in part uphold CIA's position. The court reversed its earlier ruling that CIA release material where its sources were dead, where confidentiality was not needed at the time the information was obtained from the source or where the information was innocuous or outdated. The court also upheld CIA's ability to protect information concerning potential and unwitting sources. However, the court was not convinced that contacts with domestic officials were entitled to protection in furtherance of CIA's mandate to collect foreign intelligence. The court also ordered the disclosure of information related to a CIA station where the information previously had been released by the U.S. Senate. The court's ruling on these two points is in direct conflict with other rules in the D.C. Circuit, and we expect to appeal. [redacted] Chief, Litigation Division, is the attorney handling this case. (S)

Domingo v. Marcos. In this case against the Philippine Government, plaintiffs have sought discovery from the U.S. to prove allegations that former President Marcos sent agents into the U.S. to suppress political opposition. Recently, District Judge Rothstein held an in camera, ex parte session in Seattle to question CIA about the rationale behind the DCI's formal claim of the state secrets privilege for information in CIA's files. As former C/EA Division, [redacted] represented CIA and was accompanied by [redacted] (C/Litigation Division/OGC). [redacted] explained why the disclosure of CIA's records would reveal and, thereby, harm source relationships, methods of collection, and foreign relations interests. The Under Secretary of State for Political Affairs provided CIA a letter for the Judge's review to support [redacted] testimony about the impact of disclosures on U.S.-Philippine relations. (S)

Judge Rothstein concluded that many of CIA's documents need not be disclosed, but seeks to try to "balance" the interests of plaintiffs in obtaining the documents against the United States need to protect them. State, FBI, and DOD documents also are at issue, and the Government position is that its sensitive materials -- which do not prove plaintiffs' case -- should be protected despite plaintiffs' alleged need. In other words, a valid claim of privilege is absolute. Phyllis McNeil of the Litigation Division is the attorney handling this case. (U)

Dell v. CIA, Civil No. 89-0161 (D.C. for the Middle District of Pennsylvania). On 30 May 1989, Judge Rambo dismissed this complaint against the Agency for failure to state a cause of action, and certified that any appeal taken

from that dismissal "will be deemed frivolous and not taken in good faith." The plaintiff had alleged, without stating a basis for the cause of action, that the CIA had participated in an unspecified manner in the implantation of a monitoring device in his brain. Judge Rambo previously ordered the plaintiff to either file a more definite complaint or face dismissal. The order dismissing the complaint noted that "if plaintiff truly believes he has some foreign object placed in his head, nothing is preventing him from having it removed himself." [redacted] of Litigation Division was the attorney handling this case.

New Litigations

Beverley Burke Bomstein v. CIA. This administrative claim brought pursuant to the Federal Tort Claims Act seeks one million dollars in compensation for injuries allegedly suffered by Mrs. Bomstein during three admissions to the Allan Memorial Institute, a psychiatric hospital located in Montreal, between 1958 and 1960. Mrs. Bomstein alleges that she was subjected to "unethical and inhuman experimental treatments" from Dr. Ewen Cameron and others as part of the "mind-control experiments" financed by the CIA. Mrs. Bomstein relies upon the recent settlement of the Orlikow, et al., v. United States litigation as the basis for her claim that the CIA is liable for her injuries. Mrs. Bomstein claims that she was subjected to the same treatment and suffered the same injuries as the nine plaintiffs in Orlikow but that she was unable to take legal action earlier because the treatments caused amnesia and memory lapses. [redacted] of the Litigation Division is handling this case.